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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 692

M. & M. TRANSPORTATION COMPANY, suing on its behalf and all other interstate motor carriers operating to, and from and through the City of New York,

Petitioners,

against

CITY OF NEW YORK, LAZARUS JOSEPH, as Comptroller of the City of New York, SPENCER T. YOUNG, as City Treasurer of the City of New York, and JOHN J. FAGAN, as City Collector of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 14, 1950.

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POINT I

The petition for certiorari should be denied for want of jurisdiction.

a. The determination below was based on a non-federal ground.

(1)

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it appear that a federal question was necessarily decided in determining the cause. *Lynch* v. *New York*, 293 U. S. 52 (1934); *Copperweld Steel Co.* v. *Industrial Commission*, 324 U. S. 780 (1945).

The only opinion in this case was written in the Court of first instance. Despite the fact that the opinion discusses constitutional issues, the determination was based on a non-federal ground. The constitutional discussion was merely preliminary to a determination whether, in the exercise of discretion, this was an appropriate case for the use of the declaratory judgment procedure under the New York law. The motion to dismiss was made on several grounds, including grounds which raised the constitutional issues. The Court, nevertheless, confined its determination to the non-federal ground. It dismissed the complaint pursuant to Rule 212 of the New York Rules of Civil Practice and otherwise denied the motion (fols. 16-20).

Rule 212 reads as follows:

> "**Jurisdiction discretionary.** If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

Obviously, the determination, in the exercise of discretion, that the declaratory judgment procedure is inappropriate in a particular case involves no federal question.

(2)

The petitioner has not exhausted its remedies. The tax law which the petitioner is challenging provides an adequite remedy for reviewing the questions raised by it. The petitioner has the right to have a hearing before the Comptroller of the City of New York and, should the latter's determination be adverse, to review the determination in the courts under Article 78 of the New York Civil Practice Act, a proceeding which has taken the place in this State of certiorari and mandamus proceedings. (New York City Administrative Code, §§ RR41-6.0, RR41-7.0, quoted at pp. 33-34 of petitioner's brief.)

The cases hold that, where there has been a failure to resort to such an adequate remedy, a petition for certiorari will be denied. *Mellon Co.* v. *McCafferty,* 239 U. S. 134 (1915); *McCoy* v. *Shaw,* 277 U. S. 302 (1928); *Copperweld Steel Co.* v. *Industrial Commission,* 324 U. S. 780 (1945). Cf. *Gorham Mfg. Co.* v. *Tax Commission,* 266 U. S. 265 (1924); *Utley* v. *St. Petersburg,* 292 U. S. 106 (1934); *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337 (1937); *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U. S. 206 (1938).

b. Assuming that the determination below involved a question under the Federal Constitution, the petitioner failed to exhaust his rights to appeal to the highest court of the State.

This Court is without jurisdiction to review a decision of a state court which is not the highest court of the state in which a decision could be had. *Gorham* v. *Washington University,* 316 U. S. 98 (1942); *Osment* v. *Pitcairn,* 317 U. S. 587 (1942).

The petitioner seeks "to review a decision of the Court of Appeals of the State of New York made on December

20, 1949 which denied a motion for leave to appeal to that Court, thereby affirming a decision of the Appellate Division of the Supreme Court of the State of New York, First Department" (Petition, p. 1). A denial of leave to appeal by the New York Court of Appeals is no more an affirmance by that Court than is a denial of certiorari by this Court. In *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929) the Court said (pp. 297-298, 169 N. E. at p. 390):

> "A denial of a motion for leave to appeal is not equivalent to an affirmance of the order thus withdrawn from review. It does not give to the order the value of a precedent. Not infrequently relief is refused in the exercise of discretion, for the test in many cases is the promotion of substantial justice (Const. art. VI, § 7, subd. 5; Civ. Prac. Act, § 588, subd. 5). The ruling, too, is summary. Motions for leave to appeal have the careful consideration of all the judges of the court, yet they lack the authority that attaches to a decision with all the aid of argument."

Thus, it is clear that the denial of leave is not in any sense an affirmance. It is true that, where such a denial of leave to appeal precludes an appeal to the highest state court, certiorari may issue to the intermediate court. *Adam* v. *Saenger*, 303 U. S. 59, 61 (1938). In the case at bar, therefore, the writ, if granted, should be directed to the Appellate Division. *Western Union Telegraph Co.* v. *Priester*, 276 U. S. 252, 258 (1928).

The petitioner, however, has not exhausted his rights to appeal to the highest State court, the New York Court of Appeals. The New York Civil Practice Act § 588(1), so far as pertinent, reads as follows:

> **"Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States;"

Hence, if this case directly involves constitutional questions, the petitioner could have appealed to the Court of Appeals as a matter of right. See *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186 (1925); *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. at page 298, 169 N. E. at pages 390-391; BUCHSBAUM, *Appeal as of Right to the New York Court of Appeals on Constitutional Grounds*, 24 N. Y. U. Law Quarterly Review, page 158 (Jan., 1949).

When constitutional questions are directly involved, the Court of Appeals will deny a motion for leave to appeal because an appeal can be taken as of right. Normally, when the Court denies a motion under such circumstances, it indicates that the appeal may be taken as of right. *Gearon* v. *Layman*, 280 N. Y. 807, 21 N. E. 2d 694 (1939); *Bogart* v. *County of Westchester*, 295 N. Y 934, 68 N. E. 2d 36 (1946); *Estin* v. *Estin*, 296 N. Y. 828, 72 N. E. 2d 18 (1947). The absence of such a notation concerning the right to appeal in denying a motion for leave does not preclude an appeal as of right where a constitutional question is directly involved.

The failure of the Court of Appeals to indicate that an appeal could be taken as of right in the case at bar, in all probability, resulted from the fact that the dismissal in the court below was based on the non-constitutional ground that this was an inappropriate case for the use of the declaratory judgment procedure, and, hence, no

constitutional question was directly involved in the determination of the case.

In any event, the petitioner's failure to take an appeal as of right to the Court of Appeals, such an appeal being available to it if a constitutional question were directly involved, prevents it from seeking review in this Court. *Newman* v. *Gates*, 204 U. S. 89 (1907).

POINT II

The General Business Tax Law, as applied to the petitioner, does not violate the commerce clause.

The petitioner carries on business in the City of New York. It maintains a terminal there (fol. 63). It renders services in the City to consignors and consignees, making deliveries and picking up merchandise there (fols. 63-66). It utilizes the City's streets, roads, protection and other services.

The tax is fairly apportioned in accordance with an allocation formula based on the average percentage derived from local mileage, wages and receipts.

The mere fact that one is engaged in interstate commerce does not automatically bar the imposition of local taxation. Such taxes have been upheld where they are non-discriminatory, non-cumulative and are fairly apportioned to the local activity. *Interstate Pipe Line Co.* v. *Stone*, 337 U. S. 662 (1949); *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1948); *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 (1948); *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217 (1891). See, also, *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949); *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495 (1947).

Aside from the situation where a taxpayer's percentage of activity in New York City under the allocation formula is less than 12½%, there is not the slightest basis for a claim that the tax imposes multiple tax burdens. In the

present state of the record there is no way of determining whether the activity of the petitioner in New York City is so slight as to bring the 12½% minimum tax provision into play. The validity of such a provision should be tested in a case where the challenge is made by a taxpayer affected by it. Minimum tax provisions have been upheld in the past. *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495 (1947).

POINT III

The other constitutional issues raised by the petitioner are without merit.

(1)

The contention that the tax constitutes an impost or duty on exports and imports has no foundation in the record. There is nothing in the record to support the statement that the merchandise which the petitioner transports is received at piers or docks or that it enters foreign commerce. All that the record contains with relation to foreign commerce is a bare allegation that the tax violates Article I, Section 10, Clause 2 of the United States Constitution (fol. 76).

(2)

It is asserted that there has been a denial of the equal protection of the laws in the refusal of relief to the petitioner in the form of a declaratory judgment. Under New York law, the courts are authorized to decline to pronounce a declaratory judgment in the exercise of discretion. (See New York Rule of Civil Practice 212 quoted *supra*, p. 1.) A denial of a discretionary procedure where a full review by the courts is available under other procedures does not constitute a denial of equal protection of the laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 14, 1950.

Respectfully submitted,

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